

## **REMARKS**

### **A.     Finality of Office Action**

On April 15, 2005, a Final Office Action was rendered regarding the previously mentioned patent application. On July 15, 2005, Applicants filed a Response regarding the Final Office Action. The Response included a Declaration by one of the inventors, Shawn Cornelius, and a Declaration by the undersigned. The Declarations were filed in an attempt to knock out the cited U.S. Patent No. 6,718,482 to Sato et al. An Advisory Action was mailed on August 9, 2005 indicating that the Response would be entered, but the Declarations would not be entered. Accordingly, Applicants filed a Request for Continued Examination on September 15, 2005 wherein it was requested that the Response and Declarations filed on July 15, 2005 be entered and considered. The Final Office Action of October 26, 2005 was then mailed.

It was improper to make the October 26<sup>th</sup> Office Action final. Pursuant to MPEP § 706.07(b), it is not proper to make final a first Office Action in a continuing or substitute application “where that application contains material which was presented in the earlier application after final rejection or closing of prosecution but was denied entry because (A) new issues were raised that required further consideration and/or new search, or (B) the issue of new matter was raised. In the present case, the Declarations filed on July 15, 2005 were denied entry because “applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not previously presented” (see Advisory Action mailed on August 9, 2005). However, Applicants did provide a reason for not providing the Response and Declarations earlier – the April 15, 2005 Office Action cited Sato et al. for the first time and the Response and Declarations were being filed in an attempt to knock it out as a reference. Since the reason is proper, the only other plausible reason for

not entering the Declarations was that they raised new issues that required further consideration and/or a new search. Accordingly, the denial of entry of the Declarations filed on July 15, 2005 prevents the Office Action of October 26, 2005 from being made final pursuant to MPEP § 706.07(b). Thus, the finality of the October 26<sup>th</sup> Office Action should be withdrawn.

**B. Comments Regarding Sufficiency of Declarations**

The Final Office Action mailed on October 26, 2005 presented several comments regarding the sufficiency of the Declarations filed on July 15, 2005. Applicants will address them at this time.<sup>1</sup>

**1. 37 C.F.R. § 1.131 v. 37 C.F.R. § 1.132**

The Office Action has asserted that the July 15, 2005 Declarations should have been presented under 37 C.F.R. § 1.131 instead of 37 C.F.R. § 1.132. The Office Action is correct and Applicants request that both of the July 15, 2005 Declarations be considered to have been presented under 37 C.F.R. § 1.131.

**2. Formalities of 37 C.F.R. § 1.131 Declarations**

The Office Action has pointed out that in order to antedate a reference under 37 C.F.R. § 1.131 Declarations need to be presented by all of the inventors of the claims involved. Applicants agree. However, Applicants have decided not to antedate the Sato et al. reference at this time. Should Applicants attempt to overcome a reference via Rule 131 Declarations in the future, then Declarations from all of the inventors will be presented.

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<sup>1</sup> It is noted that the Advisory Action mailed on August 9, 2005 presented several observations regarding the Declarations filed on July 15, 2005. Applicants did not respond to the observations since the Declarations were not entered and made of record. Since the Declarations are now of record, it is now an appropriate time to respond to any objections regarding the Declarations.

### **3. Conception**

The Office Action has asserted that the assertions made in the Declarations of July 15, 2005 were mere pleadings, unsupported by proof or a showing of facts. Applicants disagree. The Declaration of Shawn Cornelius filed on July 15, 2005 merely was presented to show that the information present in the '538 application was presented to the law firm of Brinks Hofer Gilson & Lione prior to January 19, 2001. Since the inventions of claims 1 and 8-12 are supported by the information present in the '538 application, then it follows that the inventions of claims 1 and 8-12 were conceived on or before the date (prior to January 19, 2001) that the same information was presented to the law firm of Brinks Hofer Gilson & Lione. Accordingly, the objection has no merit.

Despite the impropriety of the objection, Applicants have decided not to provide further evidence of reduction to practice, conception and diligence at this time. However, Applicants reserve the right to provide such evidence in the future.

### **4. Diligence**

The Office Action has asserted that the undersigned's Declaration of July 15, 2005 was a mere pleading, unsupported by proof or a showing of facts. Applicants disagree. The undersigned's Declaration contained a redacted copy of a time summary that was evidence that the undersigned's law firm was preparing the '538 application during the time frame of January 18, 2001 to January 31, 2001. It is noted that the Office Action asserts that the redacted copy does not appear in the file or record. Applicants sent a copy with their Request for Continued Examination filed on September 15, 2005. If Applicants decide to provide further evidence of diligence in the future, then Applicants will send at that time a copy of the undersigned's Declaration along with the redacted copy of the time summary with the present Response.

The Office Action further asserted that the redacted copy was presented to show conception of the inventions of claims 1 and 8-12 prior to January 19, 2001. While that is true, the redacted copy in combination with the undersigned's Declaration were also filed to show that reasonable diligence was performed from January 18 to January 31, 2001.

**C. 35 U.S.C. § 102**

In the Office Action mailed on October 26, 2005, claims 1 and 8-12 were rejected under 35 U.S.C. § 102(e) as being anticipated by Sato et al. Applicants traverse the rejection for several reasons. First, the Office Action recites items 115, 1301 and steps 1602, 1605 as disclosing the fault detector. The reliance on item 1301 and steps 1602, 1605 is improper in that the Office Action is attempting to mix components from different embodiments to arrive at the claimed invention. This is improper since the elements relied in the reference must be arranged as in the claim for anticipation to be proper. *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989). The rejection is based on the embodiment shown in FIG. 1 of Sato et al. as set forth on page 5 of the Office Action. Since there is no teaching in Sato et al. to use item 1301 and steps 1601, 1605 in the embodiment of FIG. 1, they cannot be relied on in combination with the embodiment of FIG. 1 for anticipating claim 1.

In order to expedite prosecution, Applicants will discuss the embodiments of FIGS. 1 and 13 separately below. In particular, the embodiment of FIG. 1 does not anticipate claim 1 in that the embodiment fails to disclose "a fault detector . . . to detect a fault in the remote software module by detecting whether the data message or a derivative thereof flows through at least one of the first stage software component and the second stage software component" as recited in claim 1. The embodiment of FIG. 1 includes a computer 101 that is monitored for faults taking place therein by monitoring computer 115 (Col. 4, ll. 6-9). A first operating

system 105 and a second operating system 112 operate on the monitored computer 101 (Col. 4, ll. 11-13). The first operating system 105 has a fault information collecting means 106 for collecting fault information concerning faults in the first operating system 105 when a software fault takes place in the first operating system 105 (Col. 4, ll. 31-35). The first operating system 105 detects a fault of its own and then the fault information collecting means 106 collects the fault information, such as register information and memory information during the occurrence of the fault (Col. 4, ll. 35-38). In the first operating system 105, a first fault monitor agent 104 periodically transmits an alive message 109 indicating that no fault has been detected in the first operating system 105 to the second operating system 112 (Col. 4, ll. 28-32). The alive message 109 is sent to a second fault monitor agent 108 located in the software environment of the second operating system 112 (Col. 4, ll. 28-32 and Col. 5, ll. 32-39). The second fault monitor agent 108 is in communication with a fault monitor manager 116 so as to send to the fault monitor manager 116 a fault notification from the monitored computer 101 (Col. 4, ll. 54-57). Also, the fault monitor manager 116 transmits to the second fault monitor agent 108 a command to control the monitored computer 101 (Col. 4, ll. 57-59).

The first fault monitor agent 104 transmits an alive message 109 to second fault monitor agent 108 that is indicative of normal operation of the first operating system 105. A fault detecting means 401 within the second fault monitor agent 108 decides whether the alive message 109 from the first fault monitor agent 104 is received before a predetermined fault detection time expires (Col. 5, ll. 28-55). If the alive message 109 is not received within the fault detection time, the fault detecting means 401 determines that a fault occurs in the first operating software environment 102 (Col. 5, ll. 53-55).

Based on the above description, there are two levels of fault detection occurring.

First, the first operating system 105 detects a fault within itself. There is no disclosure that such detection is performed by detecting whether a data message or a derivative thereof flows entirely through at least a software component. The second level of fault detection is determining whether an alive message 109 is received within a predetermined fault detection time by the second fault monitor agent 108. Again, such fault detection does not involve detecting whether a data message or a derivative thereof flows entirely through at least one software component. Accordingly, the embodiment of FIG. 1 does not anticipate claim 1 as amended.

Regarding the embodiment of FIG. 13 it operates in a manner similar to that of the FIG. 1 embodiment. For example, a fault is detected by first operating system 105 itself and an alive message 109 is generated when no fault is detected by the operating system 105 (Col. 14, ll. 9-13). In addition, the alive message 109 is sent to a second fault monitor agent 108 located in the software environment of the second operating system 112, as shown in FIG. 13.

Fault monitoring board 1301 determines whether a fault takes place in the first operating system environment by checking on the value of the alive message (Col. 14, ll. 13-18). A fault detecting means 1403 within the fault monitoring board 1301 decides whether the alive message 109 from the first fault monitor agent 104 is received before a predetermined fault detection time expires. If the alive message 109 is not received within the fault detection time, the fault detecting means 1403 determines that a fault occurs in the first operating software environment 102 and causes a CPU to interrupt the system (Col. 14, ll. 31-36).

So as with the embodiment of FIG. 1, the embodiment of FIG. 13 operates by having the first operating system 105 detect a fault within itself. However, there is no disclosure that such detection is performed by detecting whether a data message or a derivative thereof flows

entirely through at least a software component. In addition, the determining whether an alive message 109 is received within a predetermined fault detection time by the second fault monitor agent 108 does not involve detecting whether a data message or a derivative thereof flows entirely through at least one software component. Accordingly, the embodiment of FIG. 13 does not anticipate claim 1, as amended.

Besides not being anticipated by Sato et al., claim 1 is not rendered obvious by Sato et al. since there is no suggestion in Sato et al. or the prior art to alter Sato et al. to detect whether a data message or a derivative thereof flows entirely through at least one software component. Accordingly, claim 1 should be deemed patentable over Sato et al.

**D. 35 U.S.C. § 103**

**1. Sato et al.**

Claims 13, 14 and 18 were rejected under 35 U.S.C. § 103 as being obvious in view of Sato et al. Applicants traverse the rejection. Independent claim 13 has been amended to recite a method for monitoring a remote data processing system that determine the flow of a data message, or a derivative thereof “entirely through at least one of the first stage software component and the second stage software component” (emphasis supplied). The Office Action has relied on the embodiment of FIG. 1 and a passage at column 8, lines 28-52. For reasons similar to those given above in Section A, Sato does not disclose determining the flow of a data message, or a derivative thereof entirely through at least one stage software component. Since there is no suggestion in Sato et al. for determining such flow entirely through at least one stage software component, the rejection should be withdrawn.

**2. Sato et al. and Hirosawa et al.**

**a. Claims 2-5**

Claims 2-5 were rejected under 35 U.S.C. § 103 as being obvious in view of Sato et

al. and Hirosawa et al. Applicants traverse the rejection. Claims 2-5 depend directly on claim 1. As pointed out in Section C, Sato et al. does not disclose nor suggest altering Sato et al. to detect whether a data message or a derivative thereof flows entirely through at least one software component. Hirosawa et al. does not cure the deficiencies of Sato et al. in that Hirosawa et al. also does not suggest altering Sato et al. to detect whether a data message or a derivative thereof flows entirely through at least one software component. Accordingly, the rejection should be withdrawn.

**b. Claims 19-21**

Claims 19-21 were rejected under 35 U.S.C. § 103 as being obvious in view of Sato et al. and Hirosawa et al. Applicants traverse the rejection. Claims 19-21 depend directly or indirectly on claim 13. As pointed out in Section D.1, Sato et al. does not disclose nor suggest altering Sato et al. to determine the flow of a data message, or a derivative thereof entirely through at least one stage software component. Hirosawa et al. does not cure the deficiencies of Sato et al. in that Hirosawa et al. also does not suggest altering Sato et al. to determine the flow of a data message, or a derivative thereof entirely through at least one stage software component. Accordingly, the rejection should be withdrawn.

**3. Sato et al. and Gephardt**

Claims 6 and 7 were rejected under 35 U.S.C. § 103 as being obvious in view of Sato et al. and Gephardt. Applicants traverse the rejection. Claims 6 and 7 depend directly on claim 1. As pointed out in Section C, Sato et al. does not disclose nor suggest altering Sato et al. to detect whether a data message or a derivative thereof flows entirely through at least one software component. Gephardt does not cure the deficiencies of Sato et al. in that Gephardt also does not suggest altering Sato et al. to detect whether a data message or a derivative thereof flows entirely through at least one software component. Accordingly, the rejection



should be withdrawn.

**4. Sato et al. and Sastry et al.**

**a. Claims 15 and 16**

Claims 15 and 16 were rejected under 35 U.S.C. § 103 as being obvious in view of Sato et al. and Sastry et al. Applicants traverse the rejection. Claims 15 and 16 depend directly on claim 13. As pointed out in Section D.1, Sato et al. does not disclose nor suggest altering Sato et al. to determine the flow of a data message, or a derivative thereof entirely through at least one stage software component. Sastry et al. does not cure the deficiencies of Sato et al. in that Sastry et al. also does not suggest altering Sato et al. to determine the flow of a data message, or a derivative thereof entirely through at least one stage software component. Accordingly, the rejection should be withdrawn.

**b. Claim 22**

Claim 22 was rejected under 35 U.S.C. § 103 as being obvious in view of Sato et al. and Sastry et al. Applicants traverse the rejection. Independent claim 22 recites a method of monitoring that includes 1) determining whether a remote software module provides a logical data path of continuity to the status code and 2) outputting the status code from an output of the remote software module if the determining determines that the remote software module provides a logical data path of continuity to the status code. The Office Action relies on the embodiment of FIG. 1 and the processes of FIGS. 8 and 16. However, neither the embodiment nor the processes disclose or suggest determining whether a software module provides a logical data path of continuity. Furthermore, the embodiment and the processes fail to output a status code from the software module if it is determined that there is a logical path. It is noted that the Office Action has failed to recite one passage in Sato et al. that discloses the recited determining and outputting. Since Sastry et al. fails to suggest altering

Sato et al. to perform the recited determining and outputting, the rejection is improper and should be withdrawn.

**5. Sato et al. and Pocrass**

Claim 17 was rejected under 35 U.S.C. § 103 as being obvious in view of Sato et al. and Pocrass. Applicants traverse the rejection. Claim 17 depends directly on claim 13. As pointed out in Section D.1, Sato et al. does not disclose nor suggest altering Sato et al. to determine the flow of a data message, or a derivative thereof entirely through at least one stage software component. Pocrass does not cure the deficiencies of Sato et al. in that Pocrass also does not suggest altering Sato et al. to determine the flow of a data message, or a derivative thereof entirely through at least one stage software component. Accordingly, the rejection should be withdrawn.

**6. Sato et al., Sastry et al. and Neimat et al.**

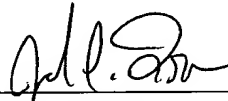
Claim 23 was rejected under 35 U.S.C. § 103 as being obvious in view of Sato et al., Sastry et al. and Neimat et al. Applicants traverse the rejection. Claim 23 depends directly on claim 22. As pointed out in Section D.4.b, Sato et al. and Sastry et al. each does not disclose nor suggest altering Sato et al. to perform the recited determining and outputting. Neimat et al. does not overcome the deficiencies of Sastry et al. and Neimat et al. since Neimat et al. does not disclose nor suggest altering Sato et al. to perform the recited determining and outputting. Accordingly, the rejection is improper and should be withdrawn.

**CONCLUSION**

In view of the arguments above, Applicants respectfully submit that all of the pending claims 1-23 are in condition for allowance and seek an early allowance thereof. If for any reason, the Examiner is unable to allow the application in the next Office Action and believes that an interview would be helpful to resolve any remaining issues, he is respectfully

requested to contact the undersigned attorneys at (312) 321-4200.

Respectfully submitted,



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